United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7270

United States Court of Appeals
FOR THE SECOND CIRCUIT

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P/S

Docket No. 76-7270

SOPHIE RUSKAY, *et al.*,
Plaintiffs-Appellants,

versus

CHAUNCEY L. WADDELL *et al.*,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT BRIEF OF APPELLEES

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ERRATA

Page 3, line 3 reads:

its principal underwriter. Its stock consisted of *2 classes* of

should read:

its principal underwriter. Its stock consisted of a class of

Page 4, line 22 reads:

tender offer was successfully closed ^ substantially all of the

should read:

tender offer was successfully closed by the acquisition of substantially all of the

Page 9, lines 15 through 19 read:

At each pleading stage, the Horenstein/Ruskay defendants *in obtaining $80 per share for their W&R/NY stock in their part,* disclaimed any liability to United or its shareholders and asserted various affirmative defenses [A 112-155, 176-196].

should read:

At each pleading stage, the Horenstein/Ruskay defendants denied each and every allegation of wrongdoing on their part, disclaimed any liability to United or its shareholders and asserted various affirmative defenses [A 112-155, 176-196].

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This appeal is taken by the plaintiffs in four consolidated shareholder actions brought derivatively on behalf of United Funds, Inc. ("United"), a mutual fund. The appeal is taken pursuant to 28 U.S.C. § 1291 from a final judgment of the District Court for the Southern District of New York [A 450], entered pursuant to Fed. R. Civ. P. 54(b), upon an opinion and order of that Court [A 441] granting summary judgment dismissing certain of the claims asserted in these actions as barred by the settlement of two prior shareholders actions (the "Horenstein/Ruskay Actions")[1] also

1. *Fred Horenstein and Joseph Sciuto,* plaintiffs v. *Waddell & Reed, Inc., et al.* defendants (67 Civ. 4175) and *Sophie Ruskay,* plaintiff v. *Joe Jack Merriman, et al.* defendants (69 Civ. 276 [See A 84-196; 237-267]. Pursuant to a settlement stipulation [A 197] approved after a hearing before Lasker, J. on notice to all shareholders of United [A 203], both actions and all claims "which might have been asserted on the basis of the matters and transactions alleged therein" were dismissed with prejudice to United and its shareholders.

brought derivatively on behalf of United against essentially the same parties or their privies[2] as well as by a release [A 234] delivered by United pursuant to the settlement. The opinion below by Metzner, J. is reported as *Ruskay* v. *Jensen* at 342 F. Supp. 264 (S.D.N.Y. 1972).

The Issue Presented

Whether the District Court was correct in finding that the claims which it dismissed are barred by the judgment entered on the settlement of the prior Horenstein/Ruskay Actions and the release executed by United pursuant thereto.

Statement of the Case

A. The Parties

Plaintiffs are and were shareholders of United at the time the Horenstein/Ruskay Actions were settled. Although represented by different counsel, Sophie Ruskay was also a plaintiff in the Horenstein/Ruskay Actions. To avoid confusion, these consolidated shareholder actions are referred to as the "Ruskay II Actions."

United is a mutual fund registered under the Investment Company Act of 1940, 15 U.S.C. § 80a-1 et seq. (the "Act"), as an open end management investment company.

2. Defendants-Appellees Waddell, Merriman, Roach and Waddell & Reed, Inc. (a New York corporation) were all parties to the Horenstein/Ruskay actions. Waddell & Reed, Inc., a Massachusetts corporation, remains a party to these consolidated stockholder actions only as successor by merger to Waddell & Reed, Inc. (a New York corporation). Appellants (Br. p. 10, fn. 3) state that they "make no point" of the fact that Mitchel J. Valicenti was not a defendant in the Horenstein/Ruskay Actions. In reliance thereon, our brief proceeds as if he was a party to the settlement of the prior action and named in the United release, a result to which he would be entitled in any event. *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313, 91 S.Ct. 1434, 28 L. Ed. 788 (1971); *Ritchie* v. *Landau*, 475 F.2d 151, 153 (2d Cir. 1973); *Zdanok* v. *Glidden Co.*, 327 F.2d 944 (2d Cir.), *cert. den.*, 377 U.S. 934, 84 S. Ct. 1338, 12 L. Ed.2d 298 (1964); *B. R. DeWitt, Inc.* v. *Hall*, 19 N.Y.2d 141, 278 N.Y.S.2d 596 (1967).

For many years prior to June of 1969, Waddell & Reed, Inc. ("W&R/NY") acted as United's investment adviser and its principal underwriter. Its stock consisted of 2 classes of publicly traded non-voting common and a much smaller class of voting common which was not publicly held.[3] Aside from voting rights, both classes were identical. In April of 1969, Waddell, Merriman and Roach owned approximately 40% of the voting stock of W&R/NY [A 192] and approximately 15% of its non-voting stock [A 6]. Waddell, Merriman, Roach and Valicenti were officers or directors or both of United and W&R/NY.

Waddell & Reed, Inc., a Massachusetts corporation ("W&R/Mass") is the successor by merger to W&R/NY.

B. Factual Background

On or before April 18, 1969, the holders of a majority of the W&R/NY voting stock, including defendants Waddell, Merriman, Roach and Valicenti (hereinafter the "Selling Shareholder Defendants") entered into an agreement with Continental Investment Corporation ("CIC"), a Boston-based financial services holding company, pursuant to which CIC undertook to make a tender offer of $80. per share for all of the outstanding stock of W&R/NY (the "CIC tender offer")[4] conditioned on its acquisition of at least 80% of the outstanding stock of W&R/NY and approval by United's shareholders of a reinstatement of its invest-

3. W&R/NY had outstanding 913,119 shares of its $1.00 par value Class A (non-voting) common stock which was publicly traded and 113,930 shares of its $1.00 par value Class B (voting) common stock held by a limited number of shareholders and not publicly traded [A6, 66].

4. The tender offer was actually made by CWR Corporation, a wholly owned subsidiary of CIC formed for that purpose. On December 31, 1969, W&R/NY was then merged with CWR Corporation and the corporate survivor was renamed Waddell & Reed, Inc. ("W&R/Mass.") [A 67].

ment advisory agreement with W&R/NY under the control of CIC. The contracting shareholders agreed to offer their shares in response to the tender offer [A 67]. At the time, the book value of the net assets of W&R/NY is alleged to have been approximately $18 per share [A 7].

United's management[5] called a meeting of its shareholders for June 3, 1969. In connection therewith, all of United's shareholders received a proxy statement, dated April 18, 1969, describing the arrangement with CIC; soliciting their approval of a reinstatement of the advisory agreement upon consummation of the CIC acquisition of W&R/NY; disclosing that, without such approval, the acquisition would, under Sections 15(a)(4) and 2(a)(4) of the Act [15 U.S.C. § 80a-15(a)(4), 80a-2a(4)], have the effect of automatically terminating United's investment advisory agreement with W&R/NY; and soliciting votes for the re-election of the fifteen (15) incumbent directors of United [A 444].

On June 3, 1969, United's shareholders approved the proposed reinstatement and re-elected its fifteen (15) incumbent directors [A 10]. On July 2, 1969, the CIC tender offer was successfully closed substantially all of the outstanding stock of W&R/NY [A 11].

C. Claims of the Ruskay II Plaintiffs

While differing in certain respects, all of the complaints filed in these consolidated shareholder actions [A 1, 18, 27

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5. At the time, United's management consisted of Waddell, Roach, Merriman, Valicenti, Gerald A. Gilbert and a majority of United's fifteen (15) directors who were not associated with either the Selling Shareholder Defendants or W&R/NY (the "Unaffiliated Directors"). Mr. Gilbert, named as a defendant in some but not all of the Ruskay II Actions but not served in any, was a minority shareholder of W&R/NY, a signatory of the CIC tender offer agreement as well as an officer and director of United [A 4, 28-29].

46] assert, on behalf of United, a right[6] to recover the amount received by the shareholders of W&R/NY for their stock in excess of its per share book value (hereinafter plaintiffs' "Rosenfeld Claims"). All defendants, including W&R/NY, are alleged to be jointly and severally liable [A 11-12].

Subsequent to the opinion and order of Judge Metzner granting summary judgment dismissing plaintiffs' Rosenfeld Claims [A 441], all other claims asserted on behalf of United in these actions, as well as all claims asserted in yet another shareholder action, were settled and dismissed by a judgment of the Southern District, dated March 22, 1976 [A 452-3]. In addition, plaintiffs' Rosenfeld Claims, to the extent asserted against CIC, certain individuals associated with CIC and W&R/Mass., a CIC subsidiary formed for the purpose of effecting the CIC tender offer and then merged with W&R/NY,[7] (the "Buying Group Defendants") were also settled and dismissed [A 452-3]. As a result, the only defendants now before the Court in respect to plaintiffs' Rosenfeld Claims are Waddell, Merriman, Roach, Valicenti and W&R/NY, as well as W&R/Mass. in its capacity as successor by merger to W&R/NY.

D. The Horenstein/Ruskay Actions

These subsequently consolidated shareholder actions were initiated on behalf of United in the Southern District of New York on October 26, 1967 and January 23, 1969 respectively. The initial complaints in both actions [A 84, 156] alleged essentially that W&R/NY, aided and abetted by Merriman, Waddell and Roach, who were officers and

6. All such claims allegedly arise under the provisions of the Investment Company Act and common law in accordance with the decision of this Court in *Rosenfeld* v. *Black,* 445 F.2d 1337 (2d Cir. 1971), *cert. dism.,* 409 U.S. 802 (1972).

7. See *supra,* fn. 4

directors of United as well as shareholders of W&R/NY, had violated its fiduciary duties to United primarily by exploiting the power of W&R/NY to direct brokerage on United's portfolio transactions in order to benefit a brokerage subsidiary of W&R/NY while refunding to United only a portion of the profits accruing from the brokerage activities of such subsidiary. Allegations were also made charging that W&R/NY had misused its ability to allocate brokerage on United's portfolio transactions to enable its subsidiary to gain the benefit of reciprocal brokerage and "give-up" arrangements with other brokers.

Upon public disclosure of the intended CIC tender offer [A 284], the Horenstein plaintiffs sought to "amend"[8] their complaint [A 283] to assert, on behalf of United, a right to "any and all proceeds . . . to be received by the Defendant shareholders . . . [of W&R/NY] as a result of their tender of . . . [W&R/NY] stock to . . . [CIC]" [A 310]. The alleged basis of such claim was that [A 308]:

> "[t]he high price being paid by . . . [CIC] for stock . . . to be tendered by . . . [W&R/NY] shareholders is largely the result of the high price earnings multiple being accorded . . . [W&R/NY] stock by virtue of . . . [its] excellent growth earnings rate of recent years, which excellent growth earnings rate is largely the result of the ever increasing profits being earned by . . . [W&R/NY] through its wholly owned (brokerage) subsidiary . . ., which profits are rightfully and lawfully the property and assets of United and which profits, past, present and future, are the subject matter of Count One of this Complaint."

Defendants in the Horenstein Action opposed the addition of such supplemental claims for lack of pendent juris-

8. Although incorrectly made under Fed. R. Civ. P. 15(a), the application to add supplemental claims relating to matters occurring subsequent to the filing of their complaints, was treated as if made pursuant to Fed. R. Civ. P. 15(d) [A 343].

diction on the ground that they were common law claims "to distrain funds and assets of the Selling Shareholder Defendants" to be received in an unrelated third party transaction [A 324-5] whereas the initial claims of the Horenstein plaintiffs were concerned exclusively with the alleged breach by W&R/NY of its fiduciary duties to United.[9]

The District Court (Tyler, J.) overruled such objections [A 338] on the ground that, for purposes of pendent jurisdiction, there was a sufficient "common nucleus of operative fact" between the initial and supplemental claims of the Horenstein plaintiffs [A 343]. It did, however, refuse to permit the Horenstein plaintiffs to add other claims concerned with the effect of the CIC acquisition on a regional stock exchange membership of the brokerage subsidiary of W&R/NY[10].

Contrary to the assertions of the Ruskay II plaintiffs (App. Br. p. 15-16), the opinion of Judge Tyler may not properly be read as either a limitation of the scope of the supplemental claims of the Horenstein plaintiffs or as an indication of how he might have ruled if either defendants had consented to the addition of such supplemental claims as they later did in the Ruskay Action [A 355] or the supplemental claims were phrased in a rhetoric more closely

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9. The implication of the Ruskay II plaintiffs (App. Br. p. 14) that the Horenstein defendants failed to recognize the substantial difference in the nature of the initial and supplemental claims of the Horenstein plaintiffs is simply erroneous.

10. The Horenstein plaintiffs also sought to assert that the acquisition by CIC of W&R/NY would exclude the brokerage subsidiary of W&R/NY from membership on the Pacific Stock Exchange and prejudice its ability to implement the very same activities challenged in the earlier pleading.

resembling plaintiffs' version of their Rosenfeld Claims.[11] All that can be said of Judge Tyler's opinion is that his view of pendant jurisdiction did not require a distinction between derivative claims for an accounting based on alleged prior breaches of fiduciary duty and United's claim to the proceeds received by the controlling shareholders of W&R/NY on the sale of their stock.

Supplemental complaints [A 107, 172] were then filed in both the Horenstein and Ruskay Actions[12] demanding that

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11. Judge Metzner points out in his opinion [A 447] that, in seeking to assert claims on behalf of United for a substantial portion of the selling price paid for control of W&R/NY on the ground that it represented a "capitalization" of the profits to be derived from the continued management of United, the Horenstein plaintiffs sought to avoid a frontal conflict with the decision of the Ninth Circuit in *SEC* v. *Insurance Securities, Inc.* 254 F.2d 642, *cert. den.*, 358 U.S. 823, 79 S. Ct. 38, 3 L. Ed.2d 64 (1958) in which the SEC sought unsuccessfully to enjoin the sale of control of a mutual fund investment adviser.

12. At § 67 of the Horenstein Supplemental Complaint [A 108], it is alleged:

> "67. With an eye toward their own personal profit and aggrandizement, and in total disregard of their fiduciary and legal obligations to United and United's shareholders, the Defendants Waddell and Merriman have agreed to and are preparing to sell their controlling stock to Continental, and the Defendants United, UCSC, and Roach have acted and continue to act in concert with Waddell and Merriman to facilitate such sale and to facilitate Continental's tender offer for the remaining outstanding shares of WRI."

At § 35 of the Ruskay Supplemental Complaint [A 173], it is alleged:

> "35. A substantial portion of the increment in value of the W&R stock proposed to be sold as aforesaid by said defendants and other W&R stockholders belongs to and is an asset of the Fund and its stockholders; and the defendants Waddell, Merriman & Roach, in disregard of their fiduciary duties to the Fund and its shareholders are planning, in conjunction with the other defendants herein, to convert such asset of the Fund to their own use and benefits."

the proposed sale of the stock of W&R/NY be enjoined or that a trust for the benefit of United be impressed on the proceeds of such sale [A 109, 174]. Such supplemental complaints alleged that Waddell, Merriman and Roach owned or controlled a majority of the voting stock of W&R/NY; that they had agreed, in disregard of their fiduciary obligations, to sell their W&R/NY stock to CIC for $80. per share; that the sale was subject to an approval by United's shareholders of the change in control of W&R/NY; that a substantial portion of such selling price belonged to United; and that the defendants, including W&R/NY, were aiding and abetting the Selling Shareholder Defendants in obtaining $80 per share for their W&R/NY stock in derogation of the rights of United.

At each pleading stage, the Horenstein/Ruskay defendants in obtaining $80 per share for their W&R/NY stock in their part, disclaimed any liability to United or its shareholders and asserted various affirmative defenses [A 112-155, 176-196]. In particular, such defendants denied that the proposed selling price of their W&R/NY stock was dependent on or affected by any wrongdoing or that they were accountable to United or its shareholders for any portion of such selling price [A 153, 195]. Moreover, the Horenstein/Ruskay plaintiffs conducted discovery, by both interrogatories and depositions, of all aspects of the proposed sale to CIC including discovery of all of the operative documents and proxy statements concerning the proposed sale [A 77].

E. The Horenstein/Ruskay Settlement.

By a stipulation of settlement, dated December 24, 1969 [A 197], the parties to the Horenstein/Ruskay Actions agreed, subject to judicial approval pursuant to Fed. R. Civ.P. 23.1, to a settlement pursuant to which the defendants agreed to pay United between $535,000 and $650,000

on the dismissal with prejudice to United and its shareholders of "all claims asserted *or which might have been asserted* on the basis of any of the matters and transactions alleged in the Horenstein/Ruskay Actions" [A 199]. The stipulation further provided for the execution and delivery by United of a release [A 202] of "any and all claims" which United "had, now has or may hereafter have . . . for or by reason of any of the matters or transactions recited or described" in the pleadings filed by plaintiffs in the Horenstein/Ruskay Actions [A 234-5].

Hon. Morris E. Lasker, to whom an application for approval of the settlement was made, convened a hearing on written notice to all shareholders of United [A 203] to determine whether the proposed settlement was fair, reasonable and adequate [A 229]. Plaintiff Ruskay appeared by her then counsel in support of the settlement [A 400-402]. The other Ruskay II plaintiffs, at that time shareholders of United, did not appear or file objections to the settlement although clearly notified[13] that the settlement

13. The notice to shareholders revealed [A 203]:

> "By supplemental complaints filed by the *Horenstein* plaintiffs . . . and by the plaintiff in the *Ruskay* action . . ., *it is alleged that the defendants Waddell, Merriman, and Roach arranged to sell a majority of the voting shares of W&R held by themselves and members of their families at a price of $80. per share;* that such price was largely attributable to the profits derived by W&R from the acts, transactions and practices complained of in their principal complaints; *and that the proposed sale should be enjoined or the proceeds thereof sequestered for the benefit of United. The defendants* involved in such allegations *have denied that they are accountable to United or its shareholders for the selling price of their W&R shares* or that such selling price was dependent on or affected by any of the improprieties or wrongdoing alleged by plaintiffs; *and that,* after full disclosure on the matter, *the shareholders of United,* on June 3, 1969, *approved the reemployment of W&R as investment adviser and Manager of United in the event that control of W&R should be acquired by the purchaser of their shares."* [A 205]

involved a final disposition of United's claims against any or all of the defendants to the proceeds realized by the Selling Shareholder Defendants on the sale of their W&R/NY stock to CIC.

At the settlement hearing, there was a thorough and comprehensive review of the record of extensive discovery taken in the Horenstein/Ruskay Actions, including transcripts of the depositions of Merriman and Waddell as well as the production of all of the operative documents relating to the arrangements by which CIC acquired control and substantially all of the outstanding stock of W&R/NY. [A 433-436, 357-399]. Contrary to the assertions now sought to be made in this Court by the Ruskay II plaintiffs (App. B. p. 19-20), the dubious nature of United's alleged right to "enjoin or participate in the exercise by . . . [the Selling Shareholder Defendants] of their property right in the stock of . . . [W&R/NY][14] was fully discussed.[15] In connection with

14. Statement of defendants' counsel in support of the proposed settlement [A 409].

15. The partial quotation (App. Br. p. 19) from the affidavit of defendant's counsel in support of the settlement of the Horenstein/Ruskay Actions (purporting to acknowledge that those actions were limited only to recovery by United for alleged brokerage improprieties) omitted the following [A 409]:

> "In their answers to such supplemental complaints, the defendants dispute that any of them, either jointly or separately, owned or controlled a majority of the voting stock of W&R and pointed out that the sale of their shares of W&R was with the approval of United's shareholders at their annual meeting held June 3, 1969 after full and fair disclosure of all matters material to the transaction; that the sale of their W&R shares was pursuant to a public tender offer whereby all shareholders of W&R were offered the same price which they received; *that United's shareholders have no right to enjoin or participate in the exercise by such defendants of their property right in the stock of W&R;* and that, in any event, the remedies which United's shareholders might have by virtue of the allegations and charges of plaintiffs' actions would be in no way impaired by the sale of their W&R stock." (Emphasis supplied.)

such discussion, the Horenstein/Ruskay defendants offered to Judge Lasker an analysis of *SEC* v. *Insurance Securities, Inc.*, 254 F.2d 642, 650, 651 (9 Cir. 1958), *cert. den.*, 358 U.S. 823, 79 S. Ct. 38, 3 L. Ed.2d 64 which, prior to the decision of this Court in *Rosenfeld* v. *Black, supra,* was the leading and accepted authority on the liabilities inherent in the sale of control of a mutual fund investment adviser [A 433-436].

While the Ruskay II plaintiffs would prefer to think otherwise (App. Br. p. 19-20), the deciding factor, recognized by all counsel and Judge Lasker, which motivated the settlement of the Horenstein/Ruskay Actions was to dispose of all derivative claims to the proceeds of the sale of W&R/NY to CIC which might be asserted against any one or more of the Selling Shareholder Defendants, W&R/NY and the Buying Group Defendants.[16] In their brief to Judge Lasker, the Horenstein plaintiffs went out of their way to say as much, stating:

> "In all candor, the opportunity of settling this litigation on a basis favorable to United came only at the point at which the shareholders of W&R, the largest of whom are the individual defendants herein, decided to sell W&R to Continental Investors Corporation." [A 393]

On May 26, 1970, Judge Lasker approved the stipulation of settlement as fair, reasonable and adequate [207]. In accordance with his decision, on June 25, 1970, Judge Lasker directed the entry of judgment which recited in relevant part:

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16. It is to be noted that following the execution of the settlement stipulation on December 24, 1969, a merger was effected on December 31, 1969 between W&R/NY and the wholly owned subsidiary of CIC through which the acquisition had been effected with funds supplied by CIC. [A 67].

> "4. The above entitled shareholder actions and complaints therein be and they hereby are dismissed on the merits and with prejudice against the respective plaintiffs, United Funds, Inc., its successors and assigns and its stockholders; and this judgment is in full and final discharge of any and all claim or claims, or cause or causes of action, or part of parts thereof which are or might have been asserted with respect to the matters and transactions alleged in said complaints against the defendants Waddell & Reed, Inc., Joe Jack Merriman, Chauncey L. Waddell, Cornelius Roach, . . . [A 230].

Pursuant to the approved settlement terms, United thereafter delivered a release, discharging ". . . W&R/NY . . . [its] directors, officers, agents and employees" [A 234] . . . including Waddell, Roach and Merriman:

> "of and from all claims . . . which . . . [United] had, now has or may hereafter have . . . for or by reason of any of the matters or transactions recited or described . . . [in any of the pleadings filed by Horenstein/Ruskay . . .]" (interpolation added).

ARGUMENT

I

A Judgment Upon a Settlement Stipulation is Entitled Full and Not Merely Partial *Res Judicata* Effect.

The gravamen of the arguments proffered on this appeal by the Ruskay II plaintiffs is that settlements in shareholder actions, in this case the Horenstein/Ruskay Actions, are to be accorded only a hostile reception with an eye quick to discern and magnify all differences between the terminology employed by the settling parties and by the subsequent claims sought to be asserted in derogation of the protection of the prior settlement.

Clearly, judicial policy is to the contrary.[17] It is well recognized that the courts favor the compromise of disputes and therefore accord a sympathetic interpretation of the scope of a prior settlement when invoked as a bar to further litigation between the same parties or their privies relative to the same matters or transactions. See e.g., *Williams* v. *First National Bank,* 216 U.S. 582 (1910) 30 S.Ct. 441, 54 L.Ed. 625; *Hennessy* v. *Bacon,* 137 U.S. 78, 11 S. Ct. 17, 34 L.Ed. 605 (1890); *Hawthorne* v. *Eckerson Co.,* 77 F.2d 845, 847 (2d Cir. 1935); *Masterson* v. *Pergament,* 203 F.2d 315, 330 (6th Cir.), *cert. den.,* 346 U.S. 832, 74 S. Ct. 33, 98 L.Ed. 355 (1953); *Florida Trailer & Equipment Company* v. *Deal,* 284 F.2d 567, 571 (5th Cir. 1960); *Schlegel Mfg. Co.* v. *USM Corp.,* 525 F.2d 775, 783 (6th Cir. 1975).

Moreover, in *Hardy* v. *Bankers Life & Casualty Co.,* 232 F.2d 205, 209, *cert. den.,* 351 U.S. 984 (1956) the Seventh Circuit held that a judgment in a settlement going beyond the pleadings "is not void when the issues decided thereby are litigated [settled] by consent."

As we have previously shown (*supra* pp. 12-13), the agreement for the settlement of the Horenstein/Ruskay Actions clearly contemplated the dismissal of all claims, however phrased, which were either asserted or might have been asserted by the Horenstein/Ruskay plaintiffs relative to the sale of control of W&R/NY to CIC; and the settlement notice advised United's shareholders that the proposed settlement dealt with United's right to enjoin or participate

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17. See *Berman* v. *Thompson,* 403 F. Supp. 695, 700 (N.D. Ill. 1975). It is, of course, well settled that a judgment entered upon a settlement (i.e. Horenstein/Ruskay) is entitled to a full *res judicata* effect. *Stella* v. *Kaiser,* 218 F.2d 64 (2d Cir. 1954), *cert. den.,* 350 U.S. 835, 76 S. Ct. 71, 100 L. Ed. 745 (1955); *Smith* v. *Alleghany Corp.,* 394 F.2d 381 (2d Cir. 1968), *cert. den.,* 393 U.S. 939, 89 S. Ct. 300, 21 L. Ed.2d 276 (1968).

in the proceeds of the sale.[18] The simple fact is that Judge Lasker concluded, as had Judge Mansfield in dismissing the plaintiff's claim in *Rosenfeld* v. *Black*, 319 F. Supp. 891 (S.D.N.Y. 1970), that United had no such right and that the compromise dismissal of such claim was of no material significance.

The opinion of this Court, in *Smith* v. *Alleghany Corp.*, 394 F.2d 381 (1968) disposed of a similar issue on the ground that (p. 391):

> "The situation here, involving a stockholders' derivative suit . . . is controlled by the rule that where the notice and representation are adequate a settlement decree in a derivative suit—a true class action—is *res judicata*."

The cases cited by the Ruskay II plaintiffs (App. Br. pp. 39-40) in their attack on the adequacy of the notice of settlement approved by Judge Lasker in the Horenstein/Ruskay Actions [A 223], are inapposite. Most of the cited cases deal only with the circumstances under which a notice in Rule 23 actions may be required; do not deal with shareholder derivative actions governed by Rule 23.1; and give no guidance on the extent to which specificity is or may be required. In *Milstein* v. *Werner*, 57 F.R.D. 515, 518 (S.D.

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18. See *supra*, fn. 13. The notice of the settlement hearing also stated that the motive of the Horenstein/Ruskay defendants was to avoid the expense and inconvenience of litigation as well as:

> ". . . . to put to rest all contentions or controversies asserted or which might have been asserted on the basis of the matters and transactions described or referred to in the various pleadings of the plaintiffs" [A 205].

United's shareholders were also advised [A 206] that the settlement terms required United to execute a release:

> "which will discharge all of the defendants of and from any further liability with reference to any or all of the matters or transactions described or referred to in the various pleadings by the plaintiffs."

N.Y. 1972), Judge Pollack approved the settlement notice despite its length.

In *Papilsky* v. *Berndt*, 466 F.2d 251 (2d Cir. 1972), this Court held only that the dismissal of a shareholder action, *without notice* to non-party stockholders, for the failure of the derivative plaintiffs to answer interrogatories was not an effective bar to a subsequent derivative prosecution of the same claim by another shareholder. In essence, *Papilsky* holds nothing more than that a dismissal for procedural deficiencies unaccompanied by notice of such dismissal to other shareholders is not the same as a litigated dismissal on the merits and bars only the plaintiffs in the original action.

Moreover, in *Grunin* v. *International House of Pancakes*, 513 F.2d 114, 120, 122, *cert. den.*, 423 U.S. 864 (1975), the Eighth Circuit approved the scope of a prior settlement notice despite its alleged inadequacies and opined (p. 122):

> ". . . class members are not expected to reply upon the notice as a complete source of settlement information . . . any ambiguities regarding the substantive aspects of the settlement could be cleared up by obtaining a copy of the agreement as provided for in the first paragraph of the notice."

As in *Grunin*, the Horenstein/Ruskay settlement notice advised United's shareholders that it was intended only as a summary of the substantive aspects of the "pleadings and other documents in this action" and advised United's shareholders where copies of the pleadings as well as a complete record of all discovery in the action might be inspected [A 206].

In *Stuyversant Insurance Company* v. *Dean Construction Company*, 254 F. Supp. 102 (S.D.N.Y. 1966) Judge Bryan set forth the rule applicable to the treatment to be accorded a prior settlement (pp. 110-111):

> "There is no doubt that a judgment entered upon a settlement is res judicata as to all questions which

> were or could have been litigated in the action in which the judgment was entered . . ."
> "It is immaterial that the settlement entered into was improvident or that . . . rights to raise constitutional and other questions under state law were unwisely relinquished. *Res judicata* guards against such hindsight as was displayed here. The principle of *res judicata*, particularly appropriate in these proceedings, "seeks to bring litigation to an end and promote certainty in legal actions." *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 38, 71 S. Ct. 104, 106, 95 L. Ed. 36 (150)."

Accord, *Chicot County Drainage District* v. *Baxter State Bank,* 308 U.S. 371, 378, 60 S. Ct. 317, 84 L. Ed. 329 (1940); *Stella* v. *Kaiser,* 218 F.2d 64 (2d Cir. 1954), *cert. den.,* 350 U.S. 835, 76 S. Ct. 71, 100 L.Ed. 745 (1955).

II

The Claims of the Ruskay II Plaintiffs are Barred by *Res Judicata*

The principle of *res judicata* reflects the law's intolerance of repetitious litigation between the same parties or their privies[19] and affirmatively precludes any party from relitigating, through a subsequent, independent action, issues that were or could have been litigated in the prior action. *Cromwell* v. *County of Sac,* 94 U.S. 351, 353, 24 L. Ed. 195 (1896); *United States* v. *Moser,* 266 U.S. 236, 241 (1924); *Tait* v. *Western Md. R.R. Co., Inc.,* 289 U.S. 620, 623, 53 S. Ct. 706, 77 L. Ed. 1405 (1933); *Lawlor* v. *National Screen Service Corp.,* 349 U.S. 322, 326 (1955); *Angel* v.

19. Since both the Horenstein/Ruskay Actions and the Ruskay II Actions were instituted derivatively on behalf of United, there is a complete identity of plaintiffs. See fn. 2 *supra,* relative to the complete identity of defendants in both actions.

Bullington, 330 U.S. 183, 193-193, 67 S. Ct. 657, 91 L. Ed. 832 (1947); *United States* v. *California & Oregon Land Co.,* 192 U.S. 355, 358 (1904). *Baltimore Steamship Co.* v. *Phillips,* 274 U.S. 316, 319, 47 S. Ct. 600, 71 L. Ed. 1069 (1927); *American Surety Co.* v. *Baldwin,* 287 U.S. 156, 166, 53 S. Ct. 98, 77 L. Ed. 231, 238 (1932). The portion of the *res judicata* rule which prevents a plaintiff from asserting a claim which "might have been presented" in an earlier action is also referred to as a prohibition against "splitting" causes of action.

This Court, in *Saylor* v. *Lindsley,* 391 F.2d 965, 968 (2d Cir. 1968), has referred to the rule as follows:

> "The general rule of *res judicata* is that a valid, final judgment, rendered on the merits, constitutes an absolute bar to a subsequent action between the same parties or those in privity with them, upon the same claim or demand. It operates to bind the parties both as to issues actually litigated and determined in the first suit, and as to those grounds or issues which might have been, but were not, actually raised and decided in that action. The first judgment when final and on merits, thus puts an end to the whole cause of action."

In *Phillips* v. *Bradford,* 228 F. Supp. 397, 401-02 (S.D. N.Y. 1964) Chief Judge Ryan applied *res judicata* to bar the prosecution of a federal claim brought by a mutual fund shareholder who had known of the "facts" supporting the fund's federal claim at the time the plaintiff shareholder opposed a State Court settlement dealing with the same transactions and occurrences which gave rise to the federal claim. As clearly expressed by Chief Judge Ryan:

> "The details of the charges of excessive fees, fraud on the stockholders and inadequate consideration are now lodged in some alleged loans and guarantees, factual details which plaintiff did not resort to when attacking the settlement in the State Court."

* * * * *

> *"It is clear that they are but different aspects of the same controversy which has been finally disposed of by a State Court judgment and which may not be impeached. Dana* v. *Morgan,* 2 Cir. 219 F. 313, aff'd 2 Cir. 232 F. 85; Schuylkill Furel Corp. v. B. & C. Nieberg Realty Corp., 250 N.Y. 304, 165 N.E. 456; Cromwell *v.* County of Sac, 94 U.S. 351, 353, 24 L.ed. 195; Zdanok *v.* Glidden Co., 2d Cir. 327 F.2d 944." (Emphasis supplied)

Accord, *Buchanan* v. *General Motors Corp.,* 158 F.2d 728, 730 (2d Cir. 1947); *Cleveland* v. *Higgins,* 148 F.2d 722 (2d Cir.), *cert. den.,* 326 U.S. 722, 66 S. Ct. 27, 99 L. Ed. 428 (1945).

A. Similarity of Claims

Purporting to recognize the rule of *res judicata,* the Ruskay II plaintiffs seek to distinguish the allegations of their pleadings from the issues of the Horenstein-Ruskay Actions by minimizing the scope of the supplemental claims asserted in those prior actions [20] while attempting to augment the essential factual predicates of their Rosenfeld Claims.[21] It is apparently of no significance to the Ruskay II plaintiffs that both the claims they seek to assert and those advanced by the supplemental complaints of the Horenstein/Ruskay plaintiffs deal with the United's right

20. In essence, the Ruskay II plaintiffs seek to characterize the supplemental claims of the Horenstein/Ruskay Actions as nothing more than an anticipatory distraint upon the assets of the Selling Shareholder Defendants (consisting of the proceeds of the sale of their W&R/NY stock) to satisfy their alleged liabilities for the activities of the brokerage subsidiary of W&R/NY (App. Br. p. 13).

21. The Ruskay II plaintiffs contend that the essence of their Rosenfeld Claims is the "use of influence with the stockholders" by the controlling sellers of a mutual fund investment adviser (App. Br. p. 24). Should they be unable to prove such "use of influence" by any of the defendants on a trial of their claims, it is doubtful they would concede failure to establish a prima facie case. Moreover, their argument ignores the allegations of the Horenstein/Ruskay supplemental complaints. See, *infra,* fn. 22.

against the *same* parties to some or all of the *same* proceeds of the *same* sale transaction based on an alleged breach of the *same* fiduciary duties.[22]

At most, the difference between the attack of the Ruskay II plaintiffs and that of the Horenstein/Ruskay plaintiffs is that the earlier action incorporated an additional legal theory to avoid complete dependence on a "sale of office" theory which had been discredited by the earlier decision of the Ninth Circuit in *SEC* v. *Insurance Securities, Inc.*, 254 F.2d 642, *cert. den.*, 358 U.S. 823, 79 S. Ct. 38, 3 L. Ed.2d 64 (1958).[23]

The assertion by the Ruskay II plaintiffs of an additional legal theory upon the operative facts alleged in the supplemental claims of the Horenstein/Ruskay Actions is insufficient, for purposes for *res judicata,* to distinguish between the "claims asserted in the prior and subsequent actions." *Chicot County Drainage District* v. *Baxter State Bank,* 308 U.S. 371 60 S. Ct. 317 84 L. Ed. 329, 1940; *Williamson* v. *Columbia Gas & Electric Corp.,* 186 F.2d 464, 469-70 (2d Cir. 1950). Well over thirty years ago, Judge Swan, writ-

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22. As we have already shown (*supra* pp. 7-9,), the supplemental claims of the Horenstein plaintiffs [A 107] sought to assert United's right to a substantial portion of the proceeds received for their W&R/NY stock by the Selling Shareholder Defendants and to hold W&R/NY jointly responsible for such recovery on the ground that [A 108] some or all of the defendants "in total disregard of their fiduciary and legal obligations to United" and that the defendants "have acted and continue to act in concert . . . to facilitate such sale and Continental's tender offer" which required approval by United's shareholders for a reinstatement of its investment advisory agreement with W&R/NY under the control of CIC (See par. "31" of the Ruskay Supplemental Complaint at [A 173]). The Ruskay Supplemental Complaint (Par. "35" [A 173]), alleged that "[a] substantial portion of the increment in value of the . . . [W&R/NY] stock proposed to be sold . . . belongs to and is an asset of the Fund . . .; and the defendants . . ., in disregard of their fiduciary duties to the Fund . . . are planning, in conjunction with the other defendants herein (W&R/NY), to convert such asset of the Fund to their own use and benefits."

23. See, *supra,* fn. 11.

ing for this Court in *Original Ballet Russe, Ltd.*, v. *Ballet Theatre, Inc.*, 133 F.2d 187, 189 (2d Cir. 1943) stated:

> "For the traditional and hydra-headed phrase 'cause of action' the Federal Rules of Civil Procedure have substituted the word 'claim'. It is used to denote *the aggregate of operative facts which give rise to a right enforceable in the courts.*" (Emphasis supplied.)

The contention advanced by the Ruskay II plaintiffs that a presentation of their present theory could have been "consciously" avoided by the Horenstein/Ruskay plaintiffs without *res judicata* effect (App. Br. p. 30) flies directly in the face of the decision of this Court in *Ritchie* v. *Landau*, 475 F.2d 151, 156 fn. 5 (2d. Cir. 1973) in which the following statement is to be found:

> "It can be strongly argued that plaintiff had an obligation in these circumstances to consolidate into a single proceeding all of his causes of action and to raise in one complaint all of the claims which he could reasonably forsee could arise out of the same transaction."

Judge Metzner was eminently correct in concluding that the gravamen of the Horenstein/Ruskay supplemental claims and of the Rosenfeld Claims of the Ruskay II plaintiffs is the alleged breach by the common defendants "of their fiduciary duty to refrain from making personal profits upon a sale of assets properly belonging to United" [A 447]. As he points out, the fact that the settling plaintiffs in the Horenstein/Ruskay Actions "alleged a formula for computing damages different from that urged" by the Ruskay II plaintiffs "is not a distinguishing factor between the two sets of cases."

B. Under Any Test the Claims of These Plaintiffs Are the "Same" As Those Alleged in Horenstein/Ruskay

In attempting to determine whether, for purposes of *res judicata*, a subsequent action between the same parties is the "same" as and, accordingly, barred by the disposition of a prior action, the courts are not dependent upon finding, as the Ruskay II plaintiffs contend, a mechanical similarity between the allegations of the first and second actions. It is, accordingly, of no moment that the Horenstein/Ruskay plaintiffs failed to employ the rhetoric of a "sale of office" theory insisted upon by the Ruskay II plaintiffs.

In *Williamson* v. *Columbia Gas & Electric Corp.*, 186 F.2d 464 (2d Cir. 1950), the Court in applying the doctrine of *res judicata* and looking to the identity of the causes of action, stated (p. 469):

> "The purpose of the principle of *res judicata* is to end litigation. The theory is that parties should not have to litigate issues which they have already litigated or had a reasonable opportunity to litigate. A reading of the early cases as compared with recent ones makes it clear that the meaning of 'cause of action' for *res judicata* purposes is much broader than it was earlier . . ."
>
> ". . . The principle which pervades the modern systems of pleading, especially the federal system, as exemplified by free permissive joinder of claims, liberal amendment provisions, and compulsory counterclaims, is that the whole controversy between the parties may and often must be brought before the same court in the same action . . ."

The courts have suggested a variety of tests for the determination of whether two claims are the "same" for *res judicata* purposes. One of the tests relied upon by the

District Court (A 446) was that set forth in *Baltimore Steamship Co.* v. *Phillips,* 274 U.S. 316, 321, 47 S. Ct. 600, 602, 71 L. Ed. 1069 (1927), i.e., whether there is "the violation of but one right by a single legal wrong." Accord, *Clarke* v. *Redeker,* 406 F.2d 883, 885 (8th Cir. 1969); *Seaboard Coast Line Railroad Co.* v. *Gulf Oil Corp.,* 409 F.2d 879, 881 (5th Cir. 1969); *Englehardt* v. *Bell & Howell Co.,* 327 F.2d 30, 33 (8th Cir. 1964).

Another test set forth by Judge Metzger at 342 F. Supp at 269, was:

> "Where the claims for relief in two lawsuits depend on the same operative facts and pertain to the same disputed transactions, they constitute the same cause of action. Saylor *v.* Lindsley, 91 F.2d 965, 969 n6 (2d Cir. 1968); Engelhardt *v.* Bell & Howell Co., 327 F.2d 30, 33 (8th Cir. 1964); Williamson *v.* Columbia Gas & Electric Corp., 186 F.2d 464, 460 (3rd Cir. 1950) cert. denied; 341 U.S. 921, 71 S. Ct. 743, 95 L. Ed. 1355 (1951)."

This Court, in its recent decision in *Herendeen* v. *Champion International Corp.,* 525 F.2d 130, 133-134 (2d Cir. 1975), mentioned several other tests:

> "Most frequently cited as the relevant criteria by both this court and the New York courts are whether a different judgment in the second action would impair or destroy rights or interests established by the judgment entered in the first action, whether the same evidence is necessary to maintain the second cause of action as was required in the first, and whether the essential facts and issues in the second were present in the first" (footnotes omitted).

In describing the test it set forth in *Baltimore Steamship,* the Supreme Court analyzed the relationship between a cause of action and the facts which comprise it.

> "[I]t is perfectly plain that the respondent suffered but one actionable wrong and was entitled to but one recovery, whether his injury was due to one or the other of several distinct acts . . . or to a combination of some or all of them. In either view, there would be but a single wrongful invasion of a single primary right of the plaintiff, whether the acts constituting such invasion were one or many, simple or complex.
>
> A cause of action does not consists of facts, but of the unlawful violation of a right which the facts show. The number and variety of the facts alleged do not establish more than one cause of action so long as their result, whether they be considered severally or in combination, is the violation of but one right by a single legal wrong. The mere multiplication of grounds of negligence alleged as causing the same injury does not result in multiplying the causes of action. 'The facts are merely the means and not the end. They do not constitute the cause of action, but they show its existence by making the wrong appear.'" 274 U.S. at 321. (Citation omitted.)

Similarly, here, the "legal right" allegedly violated was the interest of United in the proceeds paid for the acquisition of its investment adviser, by the same wrong, i.e., the breach by the defendants of their fiduciary duty not to profit personally by the transaction. At best, the present claims of the Ruskay II plaintiffs present a legal theory which either was or should have been asserted in the earlier complaint.

The claims for relief in the two suits also "depend on the same operative facts and pertain to the same disputed transactions." The scope of the terms "transaction" and "operative facts" for *res judicata* purposes was addressed by this Court in *Saylor* v. *Lindsley*, 391 F.2d 965 (2d Cir. 1968). Like the instant case, *Saylor* was a derivative action,

charging the defendants with breach of fiduciary duty and violations of, *inter alia*, the Investment Company Act of 1940. This Court described the "transactions in question" as the "sale and transfer" by the corporation on whose behalf the action was brought, of the stock of a subsidiary and the "subsequent transfer" of that subsidiary's principal asset. The action sought recission of the sales and an accounting. In discussing a *res judicata* argument, the Court stated that (p. 969):

> "the allegations in both suits clearly *pertain to the same disputed transactions and arise out of the same operative facts.* In such a case, a new theory does not create a new cause of action" (emphasis supplied).

Accord, *Berman* v. *Thompson*, 403 F. Supp. 695, 700-701 (N.D. Ill. 1975); *Norman Tobacco & Candy Company, Inc* v. *Gillette Safety Co.*, 295 F.2d 362, 363-364 (5th Cir. 1961); *Moreno* v. *Marbil Productions*, 296 F.2d 543 (2d Cir. 1961); *Reiter* v. *Universal Marion Corporation*, 299 F.2d 449, 452-453 (D.C. Cir. 1962); *Wolcott* v. *Hutchins*, 280 F. Supp. 559, 563-564 (S.D.N.Y. 1968); *McCarthy* v. *Noren*, 370 F.2d 845, 847 (9th Cir. 1966).

One of the tests set forth in *Herendeen, supra,* is "whether a different judgment in the second action would impair or destroy rights or interests established by the judgment entered in the first action." The Ruskay II plaintiffs attempt to brush this question off lightly (App. Br. p. 28). However, any analysis of the issues tendered by the pleadings in the Horenstein/Ruskay Actions and dealt with on the settlement of those actions demonstrates that permitting the instant case to proceed to judgment would impair important rights created by that settlement.

The Horenstein/Ruskay defendants denied all of the operative allegations of the Horenstein/Ruskay Supplemental Complaints including their alleged attempts to facilitate the CIC tender offer which required approval by United's shareholders of a reinstatement of the investment advisory agreement with W&R/NY under the control of CIC (see, *supra*, fn. 22) Additionally, they asserted affirmatively that they were not accountable to United on any theory for any part of the $80. per share price received or to be received for their W&R/NY stock [A 324-5]. Had the defendants prevailed on the merits of their contentions, the maintenance of their present claims by the Ruskay II plaintiffs would clearly be in derogation of rights established against and binding on United.

As pointed out by Judge Metzner [A 447], the issue presented by the case at bar is similar to that considered in *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371, 60 S. Ct. 317, 84 L. Ed. 329 (1940). Plaintiff, in that case, argued against the application of *res judicata* on the theory that the rights adjudicated in the prior case were controlled by a statute subsequently declared unconstitutional and, had the prior case been considered under that state of facts, the result would have been different. The Supreme Court rejected this argument on the ground that the constitutionality of the statute could have been challenged in the prior action. In the case at bar, the Horenstein/Ruskay plaintiffs could have elected but chose not to assert a "sale of office" theory apparently because they thought the theory to be precluded by the decision of the Ninth Circuit in *SEC* v. *Insurance Securities, Inc.* (supra).

Another test set forth in *Herendeen, supra,* is "whether the same evidence is necessary to maintain the second cause of action as was required in the first". As pointed out by the District Court, [A 447-8] citing *Englehardt* v. *Bell & Howell Co.*, 327 F.2d 30, 33 (8th Cir. 1964), this test is not

susceptible of mechanical application because of the difficulty of distinguishing between evidentiary detail and the indispensable factual predicates of a claim.

The factual predicates of the claims of the Ruskay II plaintiffs and those alleged by the supplemental claims of the Horenstein/Ruskay plaintiffs are the same. Such facts include the investment advisory relationship between United and W&R/NY; the alleged control of the Selling Shareholder Defendants; the sale of control of the investment adviser in a transaction dependent upon reinstatement of the investment advisory agreement; and that portion of the proceeds realized on such transaction were attributable to the reinstatement. That the Horenstein/Ruskay plaintiffs referred to the sales proceeds as a "capitalization" of the value attributable to the management of United by W&R/NY while the Ruskay II plaintiffs choose to allege a "premium" for the "sale of office" is a distinction without a difference.[24]

The Horenstein/Ruskay plaintiffs even went so far as to allege (see, *supra,* fn. 12), that the defendants had combined to facilitate the successful conclusion of the CIC tender offer and that, as alleged by paragraph "31" of the supplemental complaint in the Ruskay Action [A 173], the CIC tender offer was "subject to the approval by the shareholders of the Fund (United) of the change in control of [W&R/NY]." Clearly, all of the operative allegations of what the Ruskay II plaintiffs call a "sale of office" claim are to be found in the Horenstein/Ruskay pleadings. Moreover, as we have previously pointed out (*supra* p. 9), the answer of the Horenstein/Ruskay defendants specifically contested

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24. In our view, it serves no purpose to compare (App. Br. p. 32) the amounts sought in their present actions by the Ruskay II plaintiffs with the amount of the Horenstein/Ruskay settlement which was concluded, with the participation of Ms. Ruskay, at a time when the "sale of office" claims of the Ruskay II plaintiffs had been dismissed on their merit in *Rosenfeld* v. *Black,* 319 F. Supp. 891 (S.D.N.Y. 1970).

any right of United, on any basis, to participate in the proceeds of their W&R/NY stock [A 324-5].

The final test set forth in Herendeen is whether the "essential facts and issues" in the first case were present in the second. This test too is satisfied. As we have noted above, the essential facts were the same in both actions. The essential "issues", e.g. whether W&R and its shareholders were in a fiduciary position vis-a-vis United; whether the contemplated sales was a breach of that fiduciary duty; and whether some or all of the sale price was recoverable by United, are all common to both actions.

All of the relevant tests for determining whether the actions are the same for purpose of *res judicata* are satisfied in this case.

C. Plaintiffs' Principal Authority is Inapposite

In *Herendeen* v. *Champion International Corporation,* 525 F.2d 130 (2d Cir. 1975) (App. Br. p. 29), the plaintiff originally brought a state court action charging that he had been fraudulently induced to leave his employment and give up certain commercial paper accounts which he serviced by a promise that he would receive a new written employment contract and continue to receive all of his employee benefits. Mentioned "only as an element of all the damages plaintiff allegedly suffered as a consequence of the fraud," 525 F.2d at 134, was the loss of certain pension benefits. The state court action was dismissed as was barred by the statute of frauds. Subsequently, the plaintiff instituted an action in federal court, seeking accrued pension payments owed to him as a result of amounts that had been withheld from his salary over a period of fifteen years. This Court reversed the District Court's dismissal on *res judicata* grounds.

The differences between *Herendeen* and the instant cases are readily apparent. In *Herendeen,* the allegedly wrongful

acts were a fraudulent inducement to terminate a contract on the one hand, and refusal to pay benefits already accrued pursuant to a pension plan on the other. Here, both actions result from an alleged breach of fiduciary duty arising out of the same sale to CIC of the stock of W&R/NY. In *Herendeen,* the relief requested consisted of, *inter alia,* damages for the loss of commissions and employee benefits on the one hand and accrued pension benefits on the other. Here, the relief requested in both the Ruskay II Actions and the Horenstein/Ruskay Actions consist of participation in the proceeds of the same sale. The result in *Herendeen,* therefore, cannot control this case.

D. Plaintiffs' Misplace Their Reliance on the Interlocutory Decision of Judge Tyler in the Horenstein Action

The argument of the Ruskay II plaintiffs based on the interlocutory decision of Judge Tyler in the Horenstein Action is faulty syllogism. Judge Tyler allowed the addition of supplemental claims asserting United's right to a substantial part of the amount paid by CIC to the Selling Shareholder Defendants. It does not follow either that he was correct or that he would not have permitted the addition of other allegations also dealing with the acquisition by CIC of control of United's investment adviser. To the extent Judge Tyler passed on anything, he permitted claims attacking the right of the Selling Shareholder Defendants to sell their W&R/NY stock without accountability to United and barred only claims based on an interpretation of the rules of the Pacific Stock Exchange.

We might also point out that, to insure the breadth and effectiveness of the settlement of all claims which might be asserted on behalf of United in respect to the acquisition of W&R/NY by CIC, the Horenstein/Ruskay defendants subsequently consented before Judge Lasker [A 355-6] to

the filing of a supplemental complaint in the Ruskay Action asserting essentially the same claim which they had previously opposed. The argument that, under those circumstances, Judge Tyler would not have permitted the assertion of a "sale of office" claim is a simple *non sequitur*.

The Ruskay II plaintiffs misplace their reliance on *Burr Bros.* v. *The Central R.R. of New Jersey*, 202 F.2d 910 (2d Cir. 1953), and other similar cases (App. Br. p. 33-34). In all those cases, the ground of recovery could not have been asserted in the earlier action because of impediments imposed on the parties by other agencies and sources such as lack of jurisdiction, state law, lack of standing, or the protective provisions of the Bankruptcy Law. The only impediment imposed on the Horenstein plaintiffs was the opposition of their opponents who later consented to the addition of similar supplemental claims in the Ruskay Action [A 355]. Indeed, even the opinion of Judge Tyler, at fn. 13 [A 343], indicated that he was not prepared to bar any claim against the Selling Shareholder Defendants arising out of the sale of their W&R/NY stock.

III

Affirmance Is Required by The Release Executed by United Pursuant to the Horenstein/Ruskay Settlement.

As part of the Horenstein/Ruskay settlement, United executed a release of which United's shareholders had been apprised and which, by its terms, operated to insulate the defendants from any liability to United which might have arisen from the sale of W&R stock to CIC. This Court should, therefore, affirm the decision below on this wholly independent ground.

The release [A 234-236], dated October 6, 1970, discharges W&R/NY, its "directors, officers, agents and employees and all individual defendants" in the Horenstein/Ruskay Actions from any liability:

> "for or by reason of any of the matters or transactions recited or described in the complaints, supplemental complaints and/or other pleadings filed by the plaintiffs . . ."

The sale of the stock of W&R/NY to CIC were clearly "matters or transactions recited or described" in the pleadings of both the Horenstein and Ruskay plaintiffs. Accordingly, the challenge of the Ruskay II plaintiffs to the scope of United's release are unfounded.

As the Court below held, "the effect of a release is governed by the intentions of the parties. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 342-348 . . . (1971). In the present case, the conclusion is inescapable that the parties in Horenstein/Ruskay intended their release to discharge all persons involved in the CIC acquisition transaction" [A 448; 342 F. Supp. at 271]. As we have previously pointed out (*supra* p. 12), there is no reason to believe that a settlement would have been entered into, or a release accepted, unless any and all issues raised by the sale of W&R stock to CIC were finally put to rest. *Cf. DeHart* v. *Richfield Oil Corporation*, 395 F.2d 345 (9th Cir. 1968).

In *Mittendorf* v. *J.R. Williston & Beane*, 372 F. Supp. 821, 835-836 (S.D.N.Y. 1974), Judge Pollack ordered enforcement of a release similar in nature to the release here involved. Citing *Lucio* v. *Curran*, 2 N.Y.2d 157, 161-162, 157 N.Y.S.2d 948, 952 (1956), he stated:

> "Plaintiff's claims herein, arising as they do out of a controversy predating the execution of the release, might have been adjudicated at the time of its execu-

tion. Instead, plaintiff made an intelligent choice to forego litigation in favor of compromise. His execution of a valid release bars his claims herein." 372 F. Supp. at 836.

All claims stemming from the sale of W&R/NY stock to CIC, whether labeled "sale of office" or by another name, arose prior to the signing of the release and are barred.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

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13th day of Sept, 1976

Pomeranz Levy Hendelson Bloch

Attorney for Pl

per Arthur Joseph.

(2) Service of three (3) copies of

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